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June 4, 1992

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Ms. Donna R. Searcy
Secretary
Federal Communications Commission
Washington, D.C. 20554

Re: MM Docket No. 92-64
FM Channel 295A
Ocean City, Maryland

Dear Ms. Searcy:

Enclosed for filing on behalf of J. H. Communications is an original and six (6) copies of its "Reply to Opposition" of Wind 'N Sea FM Limited Partnership.

Please contact the undersigned in our Washington, D.C. office.

Respectfully submitted,

MAUPIN TAYLOR ELLIS & ADAMS, P.C.

BY:


Stephen T. Yelverton

Attorneys for J.H. Communications

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In Re Applications of:)	MM Docket No. 92-64
)	
WIND 'N SEA FM LIMITED)	File No. BPH-901224ME
PARTNERSHIP)	
)	
J. H. COMMUNICATIONS)	File No. BPH-901226MB
)	
)	
For construction permit for)	
a new FM Station on Channel)	
295A, Ocean City, Maryland)	

To: Administrative Law Judge
Edward Luton

REPLY TO OPPOSITION

J. H. Communications ("JH"), by its attorneys, pursuant to Section 1.294(c)(3) of the Commission's Rules, hereby submits this "Reply to Opposition." On May 13, 1992, JH filed a petition to dismiss the application of Wind 'N Sea FM Limited Partnership ("Wind"). On May 26, 1992, Wind filed an opposition thereto. In reply to the opposition, JH submits the following comments.

In its petition to dismiss, JH requests that the application of Wind be dismissed because of its failure to comply with the Commission's "hard look" policy adopted in Report and Order in Docket No. 84-750, 50 Fed. Reg. 19936 (1985). This policy requires that commercial FM applicants request all appropriate waivers of the rules. The failure to make such waiver requests in the application requires dismissal with prejudice. See also, Section 73.3566(a); Commission Statement on Incomplete Applications, 56 RR2d 776, 777 (1984), recon. denied, 57 RR2d 1603 (1985). The application of Wind is short-spaced to

four stations. It failed to acknowledge this short-spacing, request a waiver of Section 73.207, or to request processing under Section 73.213(c)(1).

In opposition to JH's petition to dismiss, Wind contends that it was not required to request processing under Section 73.213(c)(1). However, Section V-B, Questions 13(a) and (b), require an applicant to state whether the proposed facility satisfies the requirements of Section 73.207 and if not whether Section 73.213 applies. Wind incorrectly stated in its application that it satisfied the requirements of Section 73.207 and that Section 73.213 did not apply. Thus, under the Commission's "hard look" policy and Section 73.3566(a), this failure by Wind to acknowledge its short-spacing and its failure to request a waiver of the rules or to request processing under Section 73.213 requires dismissal of its application with prejudice.

The contention of Wind, in its opposition, that the Commission has acknowledged that the requirements of Section 73.213 are unclear misses the point. Had Wind requested processing under Section 73.213, it could take advantage of the Commission's leniency as to how Section 73.213 would apply in particular situations. However, there is no ambiguity that an applicant must acknowledge short-spacing and must request a waiver of the rules or processing under Section 73.213. Simply put, Wind failed to invoke the provisions of Section 73.213 and must now suffer the consequences.

Wind contends that the Presiding Judge cannot act on JH's petition to dismiss because the HDO fully considered the matters raised in the petition. However, this is incorrect. JH raises new matters not resolved in the HDO. The issue now raised is Wind's compliance with the "hard look" policy and with Section 73.3566(a).

In Revised Processing of Broadcast Applications, 72 FCC2d 202, 45 RR2d 1220, 1230-1231, paras. 43-46 (1979), the Commission stated that, where an HDO does not contain a "reasoned analysis" with respect to the merits of a matter, the Presiding Judge can then resolve it. The HDO, at para. 3, in this proceeding, only made a parenthetical reference to the fact that Wind failed to address the problem of any short-spacing. The HDO did not address the merits of whether this omission required the dismissal with prejudice of Wind's application under the "hard look" policy and Section 73.3566(a).

Accordingly, the Presiding Judge must address this matter. Otherwise, Wind will be required to spend tens of thousands of dollars in a comparative hearing, only to be dismissed by the Commission on appeal after issuance of an Initial Decision. Commission resources would be conserved by addressing the issue of dismissal now, not two to three years in the future.¹

¹The Presiding Judge could certify this matter to the Commission to facilitate prompt resolution. See, Section 1.106(a)(2).

WHEREFORE, in view of the foregoing, JH requests that the Presiding Judge dismiss with prejudice the application of Wind.

Respectfully submitted,

MAUPIN TAYLOR ELLIS & ADAMS, P.C.

BY: 

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June 4, 1992

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CERTIFICATE OF SERVICE

I, Kate D. Shawcross, a secretary in the law offices of Maupin Taylor Ellis & Adams, P.C., do hereby certify that on this 4th day of June, 1992, I have caused to be hand-delivered a copy of the foregoing "Reply to Opposition" to the following:

The Honorable Edward Luton
Administrative Law Judge
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